**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CRIMINAL APPELLATE JURISDICTION**
**CRIMINAL APPLICATION NO.2614 OF 2006**

Prakash Mohanlal Katariya ...Applicant

vs.

All India Shri Shivaji Memorial
Society,Pune and another ...Respondents

Mr.Tanaji Mhatugade h/f Mr.S.B.Deshmukh for the Applicant
Mr.Deepak Girme for Respondent No.1
Mr.Rajesh More, A.P.P. for State

**CORAM: A.S.OKA,J.**
**DATE : OCTOBER 12,2006.**

**JUDGMENT:**

1. Rule. The Respondents waive service. By consent of the parties taken up for hearing. Heard Advocates appearing for the parties.

2. The Applicant is the accused No.3 in a complaint filed by the first Respondent under section 138 of the Negotiable Instruments Act, 1881.

3. An Affidavit of examination-in-chief was filed by the first Respondent of one Shri Balasaheb Yeshwant Tekawade at Exh.77. The said Shri Tekawade was the Honorary Secretary of the first Respondent at the time of filing the complaint. However, the said witness is not yet cross examined on the basis of the said Affidavit filed by the first Respondent. An application was made at Exh.104 by the first Respondent praying for grant of permission to accept Vakalatnama signed

by the newly appointed Honorary Secretary of the first Respondent. It was asserted in the said Application that in the meeting dated 2nd September 2005 of the first Respondent, one Shri Ashok Santaji Modak was elected as the Secretary in place of Shri Tekawade. The second prayer in the Application is for grant of permission to substitute the Affidavit at Exh.77 by an Affidavit of newly appointed Secretary. By the impugned order dated 25th May 2006, the learned Judicial Magistrate First class allowed the said Application. The learned Judge observed that the resolution by the General Body of the first Respondent establishes that Shri Tekawade is no more Secretary. The learned Judge observed that he is no longer available for cross examination. The effect of the order passed by the learned Judge is of permitting the substitution of the Affidavit of examionation-in-chief at Exh.77 by an Affidavit of the newly appointed Secretary.

4. The learned Counsel for the Petitioner submitted that once Affidavit of evidence at Exh.77 is filed, it cannot be replaced by an Affidavit of another office bearer of the first Respondent. The learned Advocate for the first Respondent submitted that so far as the first prayer in the Application is concerned, the same deserves to be allowed as the first Respondent will have to be represented by one of its office bearers in the complaint. He fairly stated that the Affidavit at Exh.77 cannot be replaced by an Affidavit of another person and the first Respondent will make necessary application to

the Trial Court for seeking permission to produce the Affidavit of newly appointed Secretary by way of further evidence.

5. I have considered the submissions. It is not in dispute that Affidavit of evidence of Shri Tekawade is already on record at Exh.77. Once the said Affidavit is filed, it is open for the Applicant to apply under sub section 2 of Section 145 of the said Act of 1881 to summon the said witness Shri Tekawade for cross examination. Such right cannot be denied by allowing the first Respondent to substitute the said Affidavit by the Affidavit of examination in chief of newly appointed Secretary.

6. If it is permissible in law for the first Respondent to file an Affidavit of evidence of the newly appointed Secretary, it is for the first Respondent to make an appropriate application to the Trial Court in that behalf. In my view, the second prayer in the Application at Exh.104 could not have been granted.

7. Hence I pass the following order :

i) Impugned Judgment and Order dated 25th May 2006 passed below Exh.104 is modified. Prayer (a) of the Application at Exh.104 will stand granted and prayer (b) stands rejected.

ii) Rejection of the prayer (b) of the Application at Exh.104 will not preclude the first Respondent from taking appropriate steps as observed in paragraph 6 this Judgment.

iii) Rule is partly made absolute in above terms.

iv) All contentions of the parties in the pending complaint are expressly kept open.

**JUDGE**